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STEWART F. GROSSMAN, Trustee of the Newton Trust*

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re

MARKETXT HOLDINGS, CORP.; MKXT, LLC;
MARKETXT, INC.; and EPOCH INVESTMENTS
INC.,

CASE No. 04-12078 (ALG)
(SUBSTANTIVELY CONSOLIDATED)

CHAPTER 11

DEBTOR(S).

-----X
ALAN NISSELSON, as Chapter 11 Trustee of
MARKETXT HOLDINGS CORP. and THE OFFICIAL
COMMITTEE OF UNSECURED CREDITORS,

PLAINTIFFS,

ADV. PRO. No. 08-1102 (ALG)

-against-

KEVIN WALTZER and STEWART F. GROSSMAN,
Trustee of the Newton Trust,

DEFENDANTS.

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**STATEMENT OF ISSUES ON APPEAL AND
DESIGNATION OF ITEMS FOR THE RECORD**

Kevin Waltzer and Stewart F. Grossman, Trustee of the Newton Trust (“Defendants”) in the above-captioned case, by and through their attorneys, Cole, Schotz, Meisel, Forman & Leonard, P.A. and Eiseman, Levine, Lehrhaupt & Kakoyiannis, P.C. respectfully submit the following Statement of Issues and Designation of Items for the Record with respect to its appeal from the Counter Order (1) Granting Summary Judgment to Plaintiffs on Third Claim for Relief Subordinating Claim No. 4 of The Newton Trust as Assignee In Interest of Kevin Waltzer; (2) Denying Motion to Dismiss the Third Claim for Relief; and (3) Dismissing the First and Second Claims for Relief, and Deeming Such Claims for Relief as Objections to Claims Under Rule 3007 of The Federal Rules of Bankruptcy Procedure entered in this adversary proceeding on June 4, 2008 in favor of the above-named Plaintiffs (the “Counter-Order”), following an opinion marked “Not for Publication” of the Honorable Allan L. Gropper dated May 22, 2008 (the “Appealed Opinion”), granting the request of Alan Nisselson, as Chapter 11 Trustee of MarketXT Holdings Corp. (“Chapter 11 Trustee”) and The Official Committee of Unsecured Creditors (the “Committee”) (collectively, the “Plaintiffs”) for subordination of Claim No. 4 of the Newton Trust as Assignee of Kevin Waltzer (the “Waltzer Claim”) pursuant to Section 510(b) of the Bankruptcy Code.

STATEMENT OF ISSUES ON APPEAL

1. Did the Bankruptcy Court err in granting Plaintiffs’ request for subordination of the Waltzer Claim pursuant to Section 510(b) of the Bankruptcy Code?

DESIGNATION OF RECORD ON APPEAL

The Defendants submit the following designation of items from the Bankruptcy Court docket(s) to be included in the record of this appeal. Unless otherwise indicated, all the following items are listed on the docket in the above-referenced adversary proceeding:

- (a) Trustee's Motion Objecting to Claim No. 4 Filed By Kevin Waltzer (Main Case No. 04-12078; Docket No. 1108);
- (b) Complaint against Kevin Waltzer, Stewart F. Grossman (Docket No. 1) and (Main Case No. 04-12078; Docket No. 1137);
- (c) Declaration of Alan Nisselson In Support of Motion For Shortened Time To Answer Complaint and For Expedited Trial including Exhibits (Docket No. 2);
- (d) Order to Show Cause for Shortened Time to Answer Complaint and for an Order Setting Down Matter for an Expedited Hearing on the Merits (Docket No. 3);
- (e) Summons with Notice of Pre-Trial Conference (Docket No. 4);
- (f) Affidavit of Service By Hand, By Federal Express and By Electronic Transmission (Docket No. 5);
- (g) Opposition to Motion to Shorten Time to Answer Complaint and Expedite Hearing on the Merits including Exhibits (Docket No. 6);
- (h) Declaration of Mark Tulis (Docket No. 7);
- (i) Affidavit of Eric R. Levine in Support of Motion of Kevin Waltzer and Stewart F. Grossman, Trustee of the Newton Trust, to Dismiss the Third Claim for Relief for Subordination of Defendants' Claim Pursuant to U.S.C. Section 510(b), including a Notice of Motion and Memorandum of Law (Docket No. 8) and (Main Case No. 04-12078; Docket No. 1203);
- (j) Notice of Hearing on Cross Motion for Summary Judgment on Claim for Subordination of Defendant's Claim (Docket No. 9);
- (k) Memorandum of Law in Opposition to Motion to Dismiss and in Support of Plaintiffs' Cross-Motion for Summary Judgment on Claim for Subordination Pursuant to Bankruptcy Code Section 510(b) (Docket No. 10);

- (l) Declaration of Alan Nisselson in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Cross-Motion for Summary Judgment including Exhibits (Docket No. 11);
- (m) Affidavit of Service of Plaintiffs' Statement of Undisputed Facts Pursuant to Federal Rule of Bankruptcy Procedure 7056-1 in Support of Their Cross-Motion for Summary Judgment on Claim to Subordinate (Docket No. 12);
- (n) Affidavit of Service of (i) Notice of Cross Motion; (ii) Declaration of Alan Nisselson; (iii) Memorandum of Law; and (iv) Statement of Undisputed Facts (Docket No. 13);
- (o) Statement of Undisputed Facts of Plaintiffs Pursuant to Bankruptcy Rule 7056-1 in Support of their Cross-Motion for Summary Judgment on Claim to Subordinate (Docket No. 14);
- (p) Declaration of Eric R. Levine including Exhibits (Docket No. 15);
- (q) Reply Memorandum of Law of Kevin Waltzer and Stewart F. Grossman, Trustee of the Newton Trust, in Further Support of Motion to Dismiss Claim for Relief based on 11 U.S.C. Section 510(b) and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment (Docket No. 16);
- (r) Defendants' Counterstatement of Undisputed Fact (Docket No. 17);
- (s) Memorandum of Opinion Regarding Claim Filed by Kevin Waltzer (Docket No. 18);
- (t) Notice of Settlement of an Order Granting Summary Judgment to Plaintiffs for Third Claim for Relief Subordinating Claim No. 4 of The Newton Trust as Assignee of Kevin Waltzer and Denying Motion to Dismiss of Defendants (Docket No. 19);
- (u) Letter to Honorable Allan L. Gropper (Docket No. 20);

- (v) Counter Order Granting Summary Judgment to Plaintiffs on Third Claim for Relief Subordinating Claim No. 4 of the Newton Trust as Assignee in Interest of Kevin Waltzer; Denying Motion to Dismiss the Third Claim for Relief and Dismissing the First and Second Claims for Relief, and Deeming such Claims for Relief as Objection to Claims Under Rule 3007 of the Federal Rules of Bankruptcy Procedure (Docket No. 21); and
- (w) Notice of Appeal (Docket No. 22).

DATED: New York, New York
June 16, 2008

Respectfully submitted,

COLE, SCHOTZ, MEISEL,
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